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1997 State Legislative Sessions Scorecard: Developments Affecting Indigent Defense

by David J. Carroll

Introduction

The annual state legislative survey is our chance to provide readers of *The Spangenberg Report* with a synopsis of state legislative activities that may affect the delivery of indigent defense services across the nation in the coming fiscal year. This marks the third consecutive year we have conducted the survey. For three weeks this fall, The Spangenberg Group, in informal telephone interviews, surveyed public defenders, state court administrators, state and local bar officials, legislators, and representatives of national organizations on various topics. The topics covered in this year's survey include: FY 1998 public defender budgets, indigent defense systemic changes, new revenue enhancement mechanisms, indigent defense setbacks, juvenile reform, stricter sentencing reform, corrections policies, and innovative indigent defense measures. The following article reflects the information provided to us by individuals in 45 of the 50 states. We thank all of you who took the time to speak with us.

Overview: The 1997 Legislative Sessions Result in Good News for Indigent Defense Providers

For the first time in three years, the gains reported by indigent defense providers across the nation far surpassed the number of losses. In contrast with past years, respondents from several states this year reported positive indigent defense systemic changes and new revenue enhancement mechanisms while few reported that comprehensive juvenile reform bills and/or stricter sentencing measures were enacted. The vast majority of survey respondents indicated that indigent defense budgets remained relatively stable or increased over FY 1997; this accounts for much of the optimism surrounding this year's legislative survey.

FY 1998 Indigent Defense Appropriations

Fiscal year 1998 appropriations to most indigent defense programs throughout the country were greater than or the same as fiscal year 1997 appropriations, a major change from the funding trend most indigent defense organizations experienced through the majority of the 1990s. In 1992, 35 states faced budget deficits. Revenue shortfalls called for tough fiscal decisions by state legislators at a time when their constituents were demanding their elected leaders become "tough on crime." This combination produced serious strain on the justice system in many parts of the United States and brought the courts and indigent defense systems in many states to a crisis point.

By 1995, the majority of the states experienced an economic recovery. The National Association of State Budget Officers reported that most states ended fiscal year 1995 with a budget surplus. The fiscal

year 1995 combined state surpluses ($20.8 billion) reflected a remarkable 671% increase in additional funds over 1991 figures. Despite the availability of additional monies, most state legislatures did not give priority to the needs of the justice system. In the 1995 annual legislative survey (See *The Spangenberg Report*, Volume II, Issue 1), we reported that although some public defender programs and other indigent defense providers were able to obtain adequate funding, the vast majority had not seen their appropriations keep pace with the burgeoning caseloads caused by the proliferation of crime legislation enacted in prior years. In fact, despite the budget surpluses, many indigent defense providers reported that their budget appropriations for FY 1996 were less then they were in FY 1995.

In the second year of the annual legislative survey (See *The Spangenberg Report*, Volume II, Issue 4), we reported that the economic recovery experienced by many states across the country began to effect the budget appropriation of indigent defense programs. That year, respondents in 12 states reported increases in their fiscal year 1997 budget appropriations over the prior year.

The majority of states again ended the fiscal year with budget surpluses in 1997. A recent report by the National Conference of State Legislatures shows that 44 states tallied budget surpluses by the end of fiscal 1997. Five states had zero balances and only one state, New Hampshire, ran a deficit (of $10 million). The fifty states' combined budget surpluses totaled $14.2 billion, not including emergency reserve funds. When these emergency funds are factored in, the combined budget surpluses of the fifty states nearly doubles to $27.7 billion.

Fiscal Year 1997 State Surpluses and Budget Reserves (in Millions)

State	FY 97 Surplus	Reserves	State	FY 97 Surplus	Reserves
AL	$32.3	$32.3	MT	$24.7	$24.7
AK	$66.8	$3,202.7	NE	$191.5	$232.4
AZ	$510.4	$753.4	NV	$75.7	$204.7
AR	$46.3	$460.3	NH	($10.1)	$9.9
CA	$859.0	$1,267.0	NJ	$750.6	$1,078.3
CO	$306.9	$473.0	NM	$64.8	$187.0
CT	$262.6	$503.6	NY	$432.7	$749.7
DE	$117.5	$210.4	NC	$760.6	$1,261.6
FL	$496.2	$1,182.2	ND	$65.0	$65.0
GA	$0.0	$315.0	OH	$836.9	$1,665.2
HA	$93.3	$93.3	OK	$212.9	$520.7
ID	$141.1	$42.6	OR	$628.7	$628.7
IL	$806.2	$806.2	PA	$403.0	$624.0
IN	$1,080.0	$1,546.8	RI	$38.8	$92.2
IA	$0.0	$430.0	SC	$169.2	$296.2
KS	$462.8	$462.8	SD	$0.0	$24.6
KY	$52.2	$252.2	TN	$19.0	$120.0
LA	$0.0	$0.0	TX	$1,090.0	$1,919.4
ME	$15.7	$61.2	UT	$28.2	$100.0
MD	$144.5	$633.8	VT	$10.5	$45.6
MA	$365.4	$1,159.5	VA	$254.8	$414.8
MI	$50.0	$1,262.5	WA	$406.0	$406.0
MN	$912.8	$1,610.1	WV	$0.4	$71.9
MS	$67.0	$276.0	WI	$588.0	$0.0
MO	$219.7	$339.7	WY	$0.0	$0.0

Source: National Conference of State Legislators. September 1997

Among those organizations faring well is the Florida Public Defender Association (FPDA). The FPDA undertakes activities to promote and develop the state public defender system, which consists of a network of Florida's 20 elected circuit public defenders. This year, state appropriations for trial and appellate indigent defendant representation

increased by 4.5% and 7.9% respectively, for an overall budget increase of 4.8%, or $5 million. (See *The Spangenberg Report*, Volume III, Issue 4 for more information.)

The Georgia Indigent Defense Council (GIDC), a state-funded entity which distributes funds to augment county funding for indigent defense to those counties which meet GIDC guidelines and standards, received a 40% increase in its state appropriation (up from $2.5 million to $3.5 million). In fiscal year 1997, 141 of the state's 159 counties applied for and received funds for their local indigent defense systems. Additionally, the Georgia General Assembly increased the funding for GIDC's death penalty division, the Multi-County Public Defender, by 50% to $750,000. The Multi-County Public Defender provides support in capital cases at the trial and direct appeal levels throughout Georgia. The office has been involved, either as direct counsel or in an advisory fashion, in over 390 cases since its inception in October 1992. The GIDC also receives non-general fund revenue from the Clerks and Sheriffs Trust Account. Through this trust account, GIDC receives the interest accrued on a general fund for bond forfeitures. Last year GIDC received $950,000 from this alternative funding source. In total, the GIDC is responsible for funding approximately 15% of the estimated $31 million spent annually on indigent defense in Georgia.

The New Mexico Public Defender Department received a 5% increase in its overall general fund appropriation (up $2 million to $22 million). This gain is particularly noteworthy, as many other state agencies in New Mexico sustained a 2.5% cut to their budgets. Through funding provided during this legislative session, the New Mexico State Public Defender opened its first new public defender office in 15 years, bringing the total number of offices across the state to nine. Additionally, the New Mexico Public Defender has added two new full-time positions: Director of Contract Counsel Legal Services and Director of Staff Development. The Director of Contract Counsel Legal Services will be responsible for monitoring contract counsel throughout the state while the Director of Staff Development will oversee training for the Department.

Last year at this time, we reported that the Missouri State Public Defender received a 20% increase to its budget. This legislative session, the Missouri State Public Defender continued its success, receiving a 10% budget increase, bringing its FY 1998 budget to $24,778,396. The Virginia Public Defender Commission, which receives 38% ($14 million) of the state's indigent defense funding and administers 19 public defender offices in 44 of Virginia's 104 counties, received a $1 million increase to raise public defender salaries. The Ada County, Idaho Public Defender added an additional $48,000 to its budget, which will also be used for salary increases. Although a proposal to appropriate $500,000 to increase public defenders' pay in South Carolina was vetoed, the Office of Indigent Defense did receive funding for two new staff attorney positions. The Oklahoma Indigent Defense System received funding to open three new trial offices to handle non-capital trial cases, as well as funds to hire two additional attorneys and three investigators for its capital trial unit, and one attorney to handle capital direct appeal cases. Finally, the Illinois State Appellate Defender received funding for 17 new attorneys and six new support staff positions.

Of all the public defender programs we surveyed, only the Vermont Office of the Defender General reported a slight decrease in its FY 1998 budget appropriation for general operations ($5,304,722 down from $5,355,000). However, two separate, one-time appropriations - one for $132,000 to address a growing backlog in termination of parental rights cases, the other for $175,000 for computer upgrades - give the Office of the Defender General a net gain in its FY 1998 appropriation.

Public defenders in several other states mentioned that they also received specific appropriations for new or special projects. The Nevada State Public Defender received monies to upgrade its telephone system. The New Jersey State Public Defender received $690,000 for a Special Hearings Unit to represent indigent defendants charged under the state's

Megan's Law. In addition to its other successes, the New Mexico Public Defender Department received a one-time appropriation for computer upgrades. Other public defender programs receiving money for computer upgrades include: Louisiana ($5,000 per parish); Massachusetts ($1.7 million bond authorization, of which $400,000 has already been received); Minnesota ($900,000); Missouri ($1,104,000); and Sioux Falls, South Dakota ($10,000 to begin moving from a mainframe system to a PC-based system).

Tempering all of this good news are reports from public defenders of ever increasing caseloads. In the 1996 legislative scorecard summary, The Spangenberg Group reported that 77% of the respondents that year agreed with the U.S. Department of Justice, Bureau of Justice Statistics' *National Crime Victimization Survey* which indicated, for the third consecutive year, that the violent crime rate had not risen. Despite national reports indicating that the crime rate continued to drop in fiscal year 1997, including a recent report by the National Center for Juvenile Justice (NCJJ) indicating a major reduction in juvenile crime, 87% of the survey respondents stated that their caseloads were up, 7% stated that caseloads remained flat, and 7% stated that their caseloads had dropped slightly.

Our survey suggests that stricter sentencing reforms have greatly impacted public defender caseloads, despite the fact that crime rates are holding steady or falling. Several respondents to this year's survey agreed with this assessment. For example, respondents from Massachusetts and California report caseload increases due to sexual predator laws enacted in the prior legislative session, while South Carolina's public defenders indicated that their caseloads have risen due to last year's passing of the state's two- and three-strikes measures.

Indigent Defense Systemic Changes

Although most respondents commented that it was a relatively quiet year for indigent defense legislation, Arkansas, California, Indiana, Louisiana and New Jersey were among those states which instituted major changes that will have far-ranging effects on how indigent defense is delivered in their jurisdiction.

In Volume III, Issue 3 of *The Spangenberg Report* we announced that Arkansas will shift responsibility for funding indigent defense services from localities to the state beginning January 1, 1998. The General Assembly appropriated $2,871,600 for the initial year of the state-funded trial public defender system and $6,012,903 for FY 1999. A total of 141 positions, including 104 attorney positions, were authorized for Arkansas's new system. Under the new system, trial public defenders will be responsible for the representation of indigent defendants in all felony, misdemeanor, juvenile, guardianship and mental health cases, as well as all traffic offenses punishable by incarceration. In accordance with the Arkansas Public Defender Commission's Minimum Standards, two attorneys will be appointed in all capital trial cases.

The Arkansas Public Defender Commission, established July 1, 1993, played a major role in passing the new legislation. The Commission, made up of seven members appointed by the Governor to serve five-year terms, is responsible for overseeing indigency standards, evaluating public defenders, tracking public defender caseloads and providing indigent defense training throughout the state. The Commission also assists local public defender offices in covering the cost of certain litigation-related expenses if they are in compliance with the Commission's standards. This past session, the Arkansas Public Defender Commission concentrated much of its lobbying efforts on educating lawmakers unfamiliar with indigent defense.

In California, after years of debate, Governor Pete Wilson signed into law legislation that will reform the state's system of funding the trial court system. Although the state has been responsible for funding a portion of the cost of running the trial court system for ten years, the system has been in a crisis for the past several years. The 1988 law that shifted some costs for running the trial court system from the counties to the state never reduced the financial burden of running the courts to the extent that many people

projected. Though forecasts called for the state to fund roughly 70% of trial court costs by this time, the state is currently providing just half that amount. In contrast with the state's financial recovery, counties remain burdened by federal and state unfunded mandates. Additionally, Proposition 13, a state law capping the annual percentage that property taxes can be raised, severely limits the amount of revenue California's counties can garner each year.

Under the new law beginning January 1, 1998, greater control and responsibility for the disbursement of trial court funding will be centralized at the State Judicial Council. In the state's most populous 48 counties, the counties' share of court funding will be capped at what they spent in FY 1995. The state will be responsible for funding the balance of the trial court system in these counties, including any future expansion of the system. The state will also be responsible for funding all court costs in the state's ten least populated counties. In total, the new funding system is projected to reduce the financial burdens of the counties by approximately $350 million. To offset the cost to the state, California filing fees in civil cases are expected to be raised shortly.

The impact the new trial court funding system will have on indigent defense providers is unclear. California has a State Appellate Defender program, but no state monies are used to fund indigent defense at the trial court level. Under the new law, counties remain responsible for funding all indigent defense costs at the trial court level. Yet, there is some optimism among public defenders that more county money will become available for indigent defense expenses, such as expert witnesses, now that the counties's financial responsibilities for funding the trial court system is being reduced. On the other hand, indigent defense providers may be impacted adversely. If the State Judicial Council uses state funding to expand the number of trial courts in certain counties and those counties do not increase the budget appropriations for indigent defense, then indigent defense providers in those regions will be forced to staff more courts for the same amount of money.

In an effort to address long-standing problems associated with finding counsel to handle direct appeals and state post-conviction proceedings in capital cases in California, new legislation also creates the California Habeas Resource Center. The Center will be staffed with up to thirty attorneys who will handle state and federal habeas corpus proceedings for capital defendants. (There are over 470 inmates on California's death row.) The Center, which will be a part of the judicial branch of government, will also evaluate and recruit private counsel to handle capital cases, and will assist those who receive appointments. Under the bill, the State Judicial Council and the California Supreme Court are directed to adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in direct appeal and state post-conviction capital cases. Additionally, the legislation authorizes the California Supreme Court to pay appointed counsel at least $125 per hour and designate up to $25,000 for investigation and presentation of state habeas claims before issuance of an order to show just cause. The bill also expands the Office of State Public Defender (OSPD), authorizing the hiring of 15 additional attorneys and support staff to handle more direct appeals in capital cases. Under the new legislation, while OSPD will continue to handle those habeas cases it currently has, the organization will be assigned only new capital direct appeals after January 1998.

Still unclear is the role the California Appellate Project (CAP) will play under the new system. CAP was created by the State Bar of California in 1983 as a non-profit entity to recruit, evaluate, train and assist counsel appointed by the California Supreme Court in direct appeal and state post-conviction capital cases. Respondents from California said they believe that CAP will continue to support private attorneys doing capital appeals.

California based its new Habeas Resource Center on Florida's Capital Collateral Representative, which itself underwent a dramatic transformation this year. On October 1, 1997, the Florida Capital Collateral Representative, a state-funded entity which represents indigent capital prisoners in state and federal post-

conviction proceedings, was split into three separate offices covering the northern, middle and southern regions of Florida. The legislation specifies that the three offices are to function independently and operate as separate budget entities (See: *The Spangenberg Report*, Volume III, Issue 4 for more information).

Indiana took another step toward encouraging more counties to comply with the Indiana Public Defender Commission's non-capital standards, which went into effect on January 1, 1995. The state-funded commission allocates funds to offset county indigent defense expenditures in those counties which comply with the commission's qualification, compensation, caseload, and support staff size standards. This year, the Indiana legislature authorized the commission to reimburse 40% of the cost of representing indigent defendants in non-capital felony cases to those counties which comply with commission standards. Previously, the commission reimbursed 25% of these costs. However, the legislation also terminates the commission's authority to reimburse counties for the cost of providing counsel to indigent defendants facing misdemeanor charges. Currently, 12 of Indiana's 92 counties are in compliance with the commission's non-capital standards.

While the commission's more recent non-capital standards have positively impacted the state's county-based indigent defense programs, capital case standards, promulgated prior to the non-capital standards, have been especially effective in reducing death penalty costs in the state. In 1991, the Indiana Supreme Court adopted Indiana Criminal Rule 24, which was initially drafted by the commission. As with the non-capital standards, Rule 24 authorizes the commission to reimburse those counties which comply with the capital standards for 50% of the cost of attorneys' fees, as well as for expert, investigative and support services. Under Criminal Rule 24, the trial judge must appoint two death-penalty qualified attorneys who must complete 12 hours of capital litigation training every two years. The rule also sets minimum compensation standards and limits the number of additional cases the attorney may handle in the months prior to the capital trial. Randall T. Shepard, Chief Justice of Indiana, noted in a May 1996 speech that not only has Rule 24's requirement of qualified attorneys reduced the actual cost of defending capital cases, it has also significantly impacted the rate at which prosecutors seek the death penalty. In a May 1996 speech by Justice Shepard, presented at the workshop for the Judges of the Seventh Circuit, he stated that prosecutors have requested the death penalty 50% less frequently since the adoption of Rule 24 in 1991.

This year, the Louisiana Indigent Defender Board (LIDB) shifted its status from an entity under the state's judiciary to an independent state agency under the Office of the Governor. The LIDB, which was established by state supreme court rule in 1994, is responsible for promulgating and enforcing indigent defense qualification and performance guidelines. The LIDB also oversees the state's expert witness and district assistance funds. Both funds provide supplemental money to those local district indigent defender boards which demonstrate that they are making strides toward complying with the LIDB standards. Under the new legislation, the LIDB was given rule-making authority and its nine members are will be appointed equally by the Senate, the House, and the Governor. For fiscal year 1998, LIDB received $7.5 million in state funding. This past year, LIDB implemented a fully-funded state-wide appellate project and began administering a statewide capital project that oversees 40% of the state's capital trial cases.

In New Jersey, this September Governor Christine Todd Whitman signed into law a new municipal Public Defender Act which requires each of New Jersey's 537 municipal courts to employ at least one salaried municipal public defender. New Jersey has a state-funded public defender system which is responsible for all indictable offenses in New Jersey's thirteen county-based superior courts, but no state monies are used to fund indigent defense representation at the municipal level. In New Jersey, municipal courts have jurisdiction over non-indictable felonies, misdemeanors, DWI/DUI cases and traffic violations. Though New Jersey's municipalities

remain responsible for funding the municipal public defender system, the new legislation allows the municipalities to assess an up-front application fee on indigent defendants to help offset the cost of employing full-time public defenders. With over 150 of New Jersey's 537 municipal courts previously requiring mandatory pro bono services of private bar members to represent indigent defendants in municipal court, the bill received active support from the State Bar Association's Committee on Pro Bono Services (See *The Spangenberg Report*, Volume III, Issue 4 for more information.)

Other changes to indigent defense systems include:

- In Iowa, the statewide public defender system expanded into several new counties.
- In New Hampshire, a change in the contracting system allows for higher compensation rates in serious felony cases.
- In New Mexico, a Habeas Corpus Project was created where experienced attorneys will assist others across the state with habeas petitions.
- Massachusetts expanded the right to counsel to include expulsion hearings.
- The Committee for Public Counsel Services in Massachusetts also created a Mental Health training unit to assist attorneys with mental health issues in criminal proceedings.
- The Office of the Defender General in Vermont is expanding its DUI coverage unit to respond to cases 24 hours a day, seven days a week.

Revenue Enhancement Mechanisms

In an effort to supplement the largely general fund-based revenue used for indigent defense appropriations, many states have implemented public defender application fees and other revenue enhancement mechanisms in recent years. The concept of recovering some portion of the cost of providing counsel to indigent defendants is not new; many states have long had laws that authorize recoupment, whereby defendants are ordered by the court at the time of sentencing to make payments for the representation that has been provided. Yet application fees, typically nominal fixed sums ranging from $10 to $200 and paid up-front at the start of the case, are a more recent phenomenon. Up-front fees are seen as a politically viable way to increase indigent defense providers's resources because the assessment of such fees help demonstrate that indigent defense programs are doing as much as possible to ensure that they are fiscally accountable, that taxpayers's dollars are not being wasted and that indigent defendants are contributing to the cost of their defense when they can.

Sharp debate surround these fees. Opponents state that the imposition of such a fee has a chilling effect on the right to counsel. It is argued that the fee may discourage some defendants from seeking court-appointed counsel when it is available, and choose to go unrepresented rather than pay the fee. Supporters claim that when an indigent defendant pays a nominal fee, the defendant feels more like he or she has a "real lawyer" and not "just a public defender." For this reason, many proponents speculate that the payment of a small fee improves attorney/client relationships and results in a decrease in client no-show rates for court. (For more information on the debate surrounding application fees and descriptions of application fees currently in use, please contact The Spangenberg Group and request a copy of *Public Defender Application Fees: An Update* (July 1997).)

This year, public defender programs in two states (Kansas and Tennessee) enacted legislation creating an up-front indigent defense application fee, while four other states (Florida, New Jersey, Oklahoma and South Carolina) revised their laws on how application fees and other revenue enhancement mechanisms are administered.

The 1997 legislative session saw Florida modify the state's 1996 law requiring the collection of a $40 up-front fee from indigent defendants applying for appointed counsel. As originally enacted, Fla. Stat. Ann §27.52 contained language that reduced the fee or allowed for a waiver if a review of the defendant's financial situation deemed it necessary. However, in the last legislative session, the law was amended and language allowing for a waiver was stricken. The

1997 amendment requires that the affidavit of indigency contain a statement affirming the applicant's obligation to report to the court or to the indigency examiner any change in financial circumstances.

In Kansas, on July 1, 1997, the state began imposing a $35 administrative fee on any defendant entitled to state-provided counsel pursuant to K.S.A. 1997 Supp. §22-4529. As with most application fees, the court may waive payment of all or part of the fee if the assessment of the fee will impose manifest hardship on the defendant. Although revenue collected from up-front fees revert back to the general fund in several states, all monies collected from Kansas' new application fee are credited directly to the state's indigent defense services fund. The state's new law allows the fee to be returned to the defendant if the defendant is acquitted of charges or if the defendant's case is dismissed.

New Jersey has been assessing a $50 administrative fee against defendants represented by the New Jersey State Public Defender since September 1991. In September 1997, Governor Christine Todd Whitman signed into law legislation that imposes a waivable application fee of up to $200 on defendants seeking services from the new municipal public defender system (See: Volume III, Issue 4 of *The Spangenberg Report*). All revenues generated are earmarked for a dedicated fund to offset the cost of the new system within each municipality. As originally proposed, the bill called for only a $50 fee to be assessed against indigent defendants facing charges in municipal courts, but the bill was amended to allay concerns of some smaller municipalities that the cost of providing a municipal public defender would deplete their budgets. To ensure that municipalities could not profit at the expense of indigent defendants, the new law specifies that if at the end of the fiscal year a municipality's dedicated fund exceeds the previous year's expenditures for a municipal public defender by more than 25%, the excess amount must be forwarded to the statewide Victims of Crime Compensation Board, which allows victims of crime to seek counseling and medical help at no charge.

As in Florida, the Oklahoma legislature amended its application fee statute to eliminate the waiver provision for its $40 up-front fee. The new legislation allows the fee to be deferred until after conviction. As originally enacted, Okla. Stat. Ann. Tit. 22 §1355.6(C) specified that the first $20 of any fee collected would be transmitted to the Oklahoma Indigent Defense System (OIDS), with the balance being retained by the courts. Under the new statute, OIDS will no longer receive any of the revenue generated by the up-front fee, and the application fee monies will by retained by the courts. Oklahoma has had little success in collecting its application fee in the past (only $5,000 was collected in FY 1996) and the changes are seen as an incentive for the court to increase collections. We are told by representatives of OIDS that the legislature is supposed to take into consideration the amount of revenue OIDS would have collected under the old distribution scheme when determining each year's appropriation for indigent defense.

The South Carolina legislature also modified its indigent defense revenue enhancement laws in 1997. Since 1993, indigent defendants applying for court-appointed counsel have been assessed a $25 application fee. In addition, the Office of Indigent Defense benefits from revenues generated from a criminal conviction surcharge levied against every defendant - whether indigent or not - who is convicted of, pleads guilty or nolo contendere to, or forfeits bond for an offense tried in general sessions court. This surcharge, which first went into effect in FY 1993 and was modified in 1995, requires payment of an amount equal to 62% of the fine imposed as an assessment, of which 16.2% is given to the Office of Indigent Defense. A similar distribution formula for criminal conviction assessments totaling 88% of the amount of the fines imposed in magistrates's court was also established in 1995; under this formula, 11.38% of the assessments imposed are dedicated to the Office of Indigent Defense. The balance of assessments collected goes to other criminal justice

agencies.

In the most recent session, the South Carolina Legislature increased the assessment in both general sessions court and magistrates court to 100% of the fine imposed, nearly doubling the amount a convicted person must pay to the court. The Executive Director of the Office of Indigent Defense reports that some magistrates have threatened to lower the fines levied because of the new legislation. If that occurs, the Office of Indigent Defense could stand to collect less revenue in the coming year.

July 1, 1997 marked the first day that indigent defendants in Tennessee began paying an administrative fee. Senate Bill 1993, which amends Tenn. Code Ann. §§40-14-103, 37-1-126, assesses a non-refundable $50 fee against indigent defendants and against the parents or guardians of indigent minors facing juvenile proceedings. As with the Kansas application fee, the Tennessee law allows for the fee to be reduced or waived completely if the defendant lacks the resources sufficient to pay the amount. However, if a Tennessee court makes the finding that the defendant or guardian of a minor indigent defendant has the means to pay more than the $50 fee, the Tennessee legislation allows for the fee to be increased to an amount not to exceed $200. The court clerks have the responsibility to collect the new fee, and 5% of the revenue generated by the up-front fee will revert back to the court to offset the cost of collections. The remaining 95% of the revenue from the fee is deposited into the state's general fund.

In Wyoming, as of July 1996, new legislation requires public defenders to make reports on whether or not the courts were ordering recoupment payments from convicted indigent defendants. Since the reporting began, Wyoming has doubled its recoupment revenues.

Other new indigent defense revenue enhancement mechanisms include:

- A $100 application fee pilot program in Louisiana's 15th judicial district; and
- An extension of Vermont surcharges on DUI cases, to offset the cost of the Defender General providing 24-hour, seven days a week coverage for DUI calls.

Indigent Defense Setbacks

Of course, not all of the news regarding state legislative activity was good for indigent defense providers. In Iowa, Governor Terry Branstad vetoed House Bill 662, which would have significantly altered the way indigent defense is provided in the state by: creating an up-front $30 application fee from defendants seeking the services of appointed counsel; revising indigency evaluation guidelines intended to reduce the number of defendants who qualify for court-appointed counsel; and raising court-appointed attorney compensation rates (See *The Spangenberg Report*, Volume III, Issue 4).

For the fourth consecutive year, the Mississippi legislature defeated a bill that called for the creation of a nine-member Public Defender Commission to administer and oversee a state-funded public defender system similar to the state's district attorney system. (See *The Spangenberg Report*, Volume III, Issue 2 for more information.) A bill to increase Alabama's assigned counsel compensation rate to $55 per hour died in special session. A similar bill to raise assigned counsel compensation rates in New York likewise failed. Montana public defenders tried, but failed, to get their legislature to adopt more efficient indigency screening laws. Finally, although the Virginia General Assembly approved funds to open a new public defender office in Charlottesville, the governor vetoed the legislation.

Juvenile Reform

In recent years, juvenile justice reform has been a focus of numerous states' legislative efforts. In the previous two *Spangenberg Report* legislative scorecard surveys, we found that 27 states made sweeping changes to their juvenile justice codes. (See *The Spangenberg Report*, Volume I, Issue 4 and Volume II, Issue 4.) This year, the trend continued in Montana and Wyoming, where the legislatures revamped their juvenile justice codes.

The Wyoming legislature completely overhauled its laws relating to juvenile justice and Children in Need of Supervision. Wyoming legislators restructured the juvenile delinquency statute to embrace a major philosophical change: while the old statute addressed the "best interests of the child" and the "least restrictive alternatives" for delinquents, the new Juvenile Court Act focuses on the "protection of the public and public safety." Modifications to the act grant judges discretion to forgo confidentially in violent felonies and in other delinquent acts. Additionally, there is now a victim's bill of rights which applies to juvenile delinquency proceedings.

Wyoming's Juvenile Court Act establishes a 15-member State Advisory Council on Juvenile Justice (SACJJ). The SACJJ members will be appointed by the governor and representatives of each of the state's judicial districts. The SACJJ will review the progress and accomplishments of state and local juvenile justice, delinquency prevention and juvenile services projects. Additionally, the panel is empowered to collect data on and make recommendations about needed improvements in the area of juvenile justice.

Finally, the act repeals all existing laws regarding Children in Need of Supervision (CHINS) cases effective July 1, 1999. A group of public defenders, district attorneys and social workers are uniting to try to save the CHINS system before it is dismantled. As it now stands, Wyoming's Juvenile Court Act will set up Community Service Intervention Boards to develop local-based service programs for high risk children and their families in place of the CHINS system. If the CHINS program is not saved, at-risk juveniles and their families will no longer be entitled to representation after July 1, 1999.

The Montana legislature also overhauled its juvenile laws and, like Wyoming, also changed the statutory language to incorporate a philosophical shift away from the best interests of the child, toward the best interests of community protection. The new legislation lowers the age at which a juvenile can be tried as an adult in rape, homicide and attempted homicide cases from 16 to 12 and expands the types of offenses for which a 16 year old can be tried as an adult to include arson, felony assault, kidnaping, possession of explosives and possession of drugs with intent to sell. Although juveniles tried and convicted as adults between the ages of 12 and 16 cannot be incarcerated in the state penitentiary, the Montana legislature gave the Department of Corrections full discretion wherever the department sees fit to house juveniles 16 and older convicted as adults.

In California, two bills which would have provided for progressive sanctions in juvenile cases did not survive. Senate Bill 822, which would have established a $100 million grant program for community prevention projects, was tabled while still under consideration in the legislature, while Senate Bill 1050, which would have put $20 million toward establishing Youth Referral Centers for high-risk children and their families at neighborhood locations, was cut from the governor's final budget. Two juvenile projects that did make it through were: $55 million in federal crime control funds for juvenile jails and secure facilities; and $33 million for probation camps and probation emergency assistance programs.

In Idaho, publicity surrounding a case in which a juvenile killed a police officer was the impetus for legislation mandating that records for all juveniles over the age of 14 be disclosed unless both the judge *and* prosecutor find just cause to keep the records private. In a heavily criticized opinion, the Idaho Supreme Court held the legislation as unconstitutional. The legislature reportedly has plans to draft a modified version of the bill in the next session. The Maryland legislature also made a change regarding the opening of juvenile court proceedings to the public. Previously, a juvenile proceeding could only be made public if good cause was shown justifying the need for public access. Now, all delinquency hearings are public unless a good cause is stipulated as to why the proceeding should be closed. Effective November 25, 1997, the Ohio Department of Youth Services (DYS) will have a victims' services office and the director of DYS will establish policies and procedures allowing some employees to make arrests and carry firearms.

Other juvenile reform measures include:

- Alaska opening juvenile court proceedings and records;
- Colorado limiting the right to jury trials; Louisiana permitting the transfer of a juvenile to an adult facility when the juvenile reaches the age of 17; and
- Missouri and North Dakota permitting the transfer of a juvenile to adult prison upon the age of 18.

Stricter Sentencing Reform

As with juvenile reform, many respondents reported minimal action taken on stricter sentencing reform this year. For instance, we found only four states that added new death penalty crimes. Idaho will now permit punishment by death for anyone found guilty of killing an infant. Montana reclassified as a death-eligible crime a second offense rape where bodily harm is committed. Arkansas added the murder of a handicapped person to its list of death-eligible crimes, while Tennessee added the murder of an infirm victim or a victim over the age of 65.

New Jersey adopted a truth in sentencing law in June. The law requires defendants convicted of certain crimes to serve at least 85% of their sentence. Crimes covered by the law "are any crimes in which the actor causes death, causes serious bodily injury or uses or threatens to use deadly weapons." This includes sexual assaults involving the use or threat of physical force.

Nebraska Legislative Bill 90 provides for an enhanced penalty for criminal offenses committed against a person or a person's property because of his or her race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age or disability. Nevada now denies probation for Class E Felonies (drug possession). The North Dakota Legislature passed a Sexual Predator law that will allow for civil commitment procedures. Finally, public defenders in Louisiana are anticipating additional work due to a new "shoot the carjacker" bill. In Louisiana, it is now justifiable to commit a homicide against a person "whom one reasonably believes is attempting to use force against a person present in a motor vehicle."

Many respondents commented on their own successful attempts to help defeat stricter sentencing reforms. Public defenders in Alaska, Iowa, Massachusetts and Wisconsin help to defeat the latest attempts to enact death penalty legislation in those states. Similarly, the public defender in New Hampshire helped quash efforts to greatly expand the death penalty by testifying on the high costs associated with the proposed expansion. The Maryland Public Defender helped to defeat by one vote legislation that would have allowed the death penalty to be sought against non-principal assailants in murder cases. The public defender in Hawaii successfully helped to defeat a sweeping sentencing reform bill that would have required mandatory minimums. Finally, Minnesota public defenders help hold off an effort to change the order of final argument during trials. In that state, the prosecutor presents his or her final argument followed by the defense counsel's final argument with no prosecutorial rebuttal. Prosecutors were pushing for a right to rebuttal.

Corrections Policies

This year, at least 17 states reported that monies were appropriated for new prison expansion and/or to supplement ongoing prison expansion projects. Alabama's legislature appropriated $9 million to complete a medium security adult male prison while Colorado has earmarked almost $140 million over the last two years to build a geriatric prison and an all-purpose, 437-bed facility. Minnesota set up a work camp for property offenders. North Dakota will build a new medium security prison attached to the state hospital; New York will build two new maximum security facilities; South Dakota's legislature funded a new penitentiary wing and a new juvenile boot camp; and Vermont is currently building a 350-bed minimum security prison and plans to add 500 more beds in the next five years. Alaska and Idaho are seriously considering proposals to privatize their prison systems.

A $290 million prison expansion appropriation in 1996 materialized as two new facilities in Missouri this year. Funds for Minnesota's $89 million prison project of 1996 were re-appropriated this year when the project was redesigned to allow for double bunking. Other new facilities opened this year include a women's facility in Clark County, Nevada and a 3,198-bed state penitentiary in New Jersey.

In addition to providing funds for prison construction, legislators also pushed for more restrictive prison policies in 1997. Louisiana restricted the availability of "good time" for persons convicted of violent crimes and allowed the sentencing board to put further restrictions on all inmates' eligibility for good time. Louisiana also passed a law that allows sheriffs to recover the cost of "room and board" from an inmate, provided the Department of Corrections promulgates rules to insure reasonable and uniforms rates of reimbursement. Similarly, Iowa now assesses the cost of housing prisoners from inmates by deducting a portion of their work allowance. Arkansas prisoners now lose "good time" if they are deemed to have filed frivolous lawsuits. Alabama transferred funding responsibility for prison educational programs from the Department of Education to the Department of Corrections. Wyoming now requires mandatory work of all prisoners. Finally, detainees in South Dakota are not allowed to participate in work release programs until after the first 60 days of their sentence is served, effectively making it impossible for many short-term, non-violent offenders to keep their jobs.

Many of the restrictive prison policies instituted this year were not the result of legislative initiatives, but rather the departments' of corrections own "get tough on prisoners" policies. Some department of corrections measures undertaken in the states include:

- Elimination of televisions in private cells (Alaska);
- Reinstitution of chain-gangs (Louisiana);
- Restrictions on private computers and internet privileges (Minnesota);
- Elimination of smoking in prisons (Montana, North Dakota);
- Hard labor breaking rocks for juvenile detainees (New Mexico);
- Elimination of weight-lifting/gym privileges (South Carolina);
- Elimination of many teaching positions (Tennessee); and
- Closing of prisons law library (Arizona, South Dakota).

Conclusion

To provide our readers with the latest innovative ideas in the indigent defense field, we concluded our survey by asking respondents if there were any new measures in their programs or states that they felt other indigent defense providers would want to know about. Respondents from Alaska, Arizona, California, Georgia, Kentucky, Michigan, Missouri and Vermont shared news of ongoing initiatives.

In Alaska, a Department of Justice survey is currently being conducted by the National Institute of Corrections to assess the effectiveness of the state's sentencing measures. Public defenders in the state feel that this is a positive step because early reports have favorably reviewed innovative sentencing measures which allow Native American villages to have tribal courts with jurisdiction over misdemeanor cases. Alaska also has seen a trend toward greater placement of offenders in half-way houses rather than prison.

The success of the Pima County (Tucson), Arizona Model Court Program, which attempts to resolve child custody/parental rights issues in a timely manner, has prompted Chief Justice Thomas Zlaket to call for statewide implementation of the project. Under the Model Court Program, the preliminary protective hearing must take place within five days of the dependency petition being filed. The success of the program centers on settlement conferences, in which both the child and the parent are represented by counsel, where both parties meet with a Child Protective Services representative and a representative from the Attorney General's office to discuss the petition and discuss a case plan. In many instances, agreements are reached before a judge has to

intervene. The ultimate goal of the project is to place the child in a safe, permanent home within one year of the petition being filed.

In California, Michael Judge, Los Angeles County Public Defender, was recently named to the chair of the Los Angeles Information Systems Advisory Board (ISAB). ISAB is made up of representatives from the District Attorney's Office, Department of Coroners, Los Angeles Police Department, Municipal Court Judges Association, Municipal Court Presiding Judges Association, Probation Department, Public Defender's Office, Sheriff's Office, and the Superior Court, among others. ISAB serves as the only county-wide forum for the planning and development of major justice information systems in the state. As Chair, Mr. Judge will oversee the design, development and implementation of information systems to support the collective needs of the justice community. Mr. Judge was also appointed Vice-Chair of the Los Angeles Drug Court Oversight Committee.

The Georgia General Assembly passed legislation appointing Michael Shapiro, the Director of the Georgia Indigent Defense Council, to the state's Criminal Justice Coordinating Council (CJCC). The CJCC is responsible for improving the criminal justice system and distributes approximately $29 million in grants to criminal justice organizations throughout the state. This marks the first time a member of the criminal defense community will serve on the council.

Kentucky's governor has appointed a twenty-member criminal response team to make recommendations on issues concerning the state's criminal justice system. Two of the members, Ernie Lewis and Dan Goyette, are public defenders from the Department of Public Advocacy. The team's recommendations are expected in December.

By expanding on-line information services, The Michigan State Appellate Defender Office (SADO) has seen reductions in costs. SADO developed a website that allows defense attorneys throughout the state to access recent criminal defense decisions by Michigan courts and by the U.S. Supreme Court. The site also allows access to the criminal defense database and posts updates of upcoming training sessions and criminal defense bulletins. Visit the site at http//www.sado.org.

In Missouri, public defenders found an innovative way to increase office space when needed. The members of the Missouri State Public Defender are state employees, but by statute the counties must provide them with office space. Securing office space to accommodate new employees was difficult until the public defenders persuaded the legislature to withhold the county prison per diem money from the counties until adequate space is provided. The Missouri Public Defender reports that additional office space is much easier to come by these days.

The Vermont Defender General is very positive about two new initiatives in his state. A state House of Representatives committee and a task force of judges, attorneys and drug treatment experts are giving serious thought to bringing drug courts to the state. The model under consideration combines intensive judicial supervision and treatment to help substance abusing criminals. The other initiative is called "Stop it Now!," a pilot program that seeks to assist persons who sexually abuse children by using a confidential helpline to guide abusers into treatment centers.

The Spangenberg Group is always interested in court or legislative actions which affect the indigent defense function. Has any legislative or court action affected your work? Has funding been increased or cut? If you want to share your experiences, please contact us by phone: (617) 969-3820, fax: (617) 965-3966, or e-mail: rspange@channel1.com. ❖

NEWS FROM AROUND THE NATION

U.S. Attorney General Reno Demonstrates Her Commitment to Indigent Defense Issues

In recent months, U.S. Attorney General Janet Reno and other U.S. Department of Justice officials have taken a number of important steps to learn more about, draw public attention to and attempt to address

the barriers to the effective delivery of indigent defense services across the nation. These steps include corresponding with leaders of the National Association of Criminal Defense Lawyers and the American Bar Association; earmarking funds for a comprehensive national indigent defense systems study; publicly recognizing the problems which characterize the delivery of indigent defense services in each of the state; and, most recently, convening a group of indigent defense leaders to discuss these problems and to identify solutions.

In mid-September, selected indigent defense community leaders met with representatives of the U.S. Department of Justice in Washington, DC, to discuss their most pressing concerns regarding delivery of indigent defense services, and to propose the steps which the Department of Justice can take to help improve the quality and availability of indigent legal defense services. U.S. Attorney General Janet Reno, who convened the meeting, attended, as did Assistant Attorney General Laurie Robinson of the Office of Justice Programs, Deputy Assistant Attorney General Noel Brennan of the Office of Justice Programs, and Nancy Gist, Director of the Bureau of Justice Assistance. Among the concerns voiced at this important meeting were the following: adequate and balanced funding for each member of the criminal justice system's adjudication component (which consists of defense, courts and prosecution); the limited availability of federal funds for state indigent defense programs; the effects of federal habeas reform; greater public recognition by the Department of Justice of the value of the defense function; assuring that jurisdictions which contract for indigent defense services do so fairly; and improving assigned counsel compensation rates.

The off-the-record meeting, reportedly the first in a series, is the latest in Attorney General Reno's recent actions focusing on the delivery of indigent defense services. On August 2, 1997, at the 1997 ABA Annual Meeting in San Francisco, CA, Attorney General Reno delivered a powerful speech to the ABA's Criminal Justice Section in which she stated: "The legitimacy of our justice system depends on our efforts to ensure the fairness of the system for everyone, regardless of wealth." Ms. Reno identified her own concerns regarding the delivery of indigent defense services:

- "totally unreasonable" caseloads;
- balanced caseload standards;
- financial balance between prosecutors and defenders;
- training;
- technological resources, including access to DNA and forensic testing; and
- better understanding and acceptance of conflict standards.

In her address, Ms. Reno stated:

> For 15 years as a prosecutor I became convinced that to achieve justice for defendants . . . we had to have adequate funding, adequate training and adequate resources for indigent defendants. To give people confidence in the justice system, we had to have adequate funding, adequate training and adequate resources for indigent defenses . . . And to ensure effective law enforcement, we need to have an adequate indigence defendant (*sic*) systems that functions properly to prevent continuances, to prevent delay and the frustration of reversals on appeal.

Ms. Reno also highlighted the need for statistical data regarding the nation's indigent defense systems, referencing the Bureau of Justice Statistics/Bureau of Justice Assistance national indigent defense study, which is discussed in greater detail on pages 15 - 17.

To achieve these goals, U.S. Attorney General Reno imparted that it is imperative "to educate state legislators an Congress in understanding the critical need for indigent defense services..." The public is not served when prosecutors cannot take a case to trial, "because the defender doesn't have enough time because the public defender has a totally unreasonable caseload."

One of the catalysts for Attorney General Reno's interest in delivery of indigent defense services is

undoubtedly the efforts of Judy Clarke, former National Association of Criminal Defense Lawyers (NACDL) President and chief federal public defender in the eastern district of Washington state, who in November 1996 initiated a dialogue with Attorney General Reno to address "our collective failure to provide adequate representation to the poor in America." In her letter, Ms. Clarke identified the following areas of concern: high caseloads and lack of funds for investigative or expert services; the inadequacy of funds provided to CJA panel attorneys; and harsher and more complicated criminal laws, including the "evisceration of *habeas corpus* in 1996" and the highly complex federal Sentencing Guidelines. These deficiencies become even more apparent and problematic, Ms. Clarke wrote, when compared to the wealth of resources available to prosecution and law enforcement.

In response, Associate Deputy Attorney General Rory L. Little, writing at the request of Attorney General Reno, indicated a willingness to discuss both the identified problems and possible solutions to these problems. Over the winter of 1997, the NACDL-DOJ exchange continued. One of the most important proposals to result from this dialogue concerns the convening of a national summit on ways to improve the state of indigent defense in America. In early February 1997, William W. Taylor, III, Chair of the American Bar Association's Criminal Justice Section, entered the discussion, writing to Attorney General Reno in support of Ms. Clarke's initiatives. Mr. Taylor was particularly supportive of Ms. Clarke's proposal that Attorney General Reno convene a national indigent defense summit.

In late May, Judy Clarke again wrote to Attorney General Reno, urging her to join NACDL and the ABA in addressing problems with the delivery of indigent defense services. In mid-June, ABA President Lee Cooper by letter to Attorney General Reno joined Judy Clarke, reiterating the ABA's hope that she will address the issue of adequate and balanced funding of the adjudication component of the justice system - the courts, prosecution and defense - and suggesting that she focus particularly on defense. By her recent actions, Attorney General Reno has demonstrated the concern of the Department of Justice regarding issues pertaining to indigent defense specifically, which in turn relates to the efficient functioning of the broader criminal justice system.

We will keep you posted on any developments related to Attorney General Reno's and the Department of Justice's efforts to improve the delivery of indigent defense services.❖

National Survey of Indigent Defense Systems Begins

For the first time in over a decade, nationwide, baseline data on state and local-level indigent defense systems will be collected through a survey sponsored by the U.S. Department of Justice's Bureau of Justice Statistics and Bureau of Justice Assistance. The Spangenberg Group was recently notified that it has been awarded the grant. The Chicago, Illinois survey research firm, the National Opinion Research Center (NORC), will join The Spangenberg Group, assuming responsibility for fielding the survey. Work on the two-year project will begin before year's end.

Basic data on the types of indigent defense systems used in each of the 50 states, and the caseload, expenditure and trends among the various systems was last collected in 1986. In the 1980s, there were two nationwide surveys conducted on indigent defense programs, both commissioned by the Bureau of Justice Statistics. Data from the two surveys was highlighted in three BJS publications. The first, *Criminal Defense Systems* (1984), is a 10-page Special Report covering 1982 data. The second, *National Criminal Defense Systems Study: Final Report*, is a 119-page presentation of the same 1982 data discussed in *Criminal Defense Systems*, but with much greater detail and analysis. The third, a 1988 BJS Bulletin, *Criminal Defense for the Poor, 1986,* discusses 1986 survey data. Robert Spangenberg conducted both of the surveys, the first while employed by Abt Associates and the second in 1986 for The Spangenberg Group.

There have been numerous developments affecting indigent defense since 1986, underscoring the need for updated research. Some of the major developments include the war on drugs, increased indigent caseload, the advent of drug courts, tougher sentencing including "three strikes" laws, a move toward treating juveniles offenders as adult offenders, more punitive juvenile sanctions, expansion of the death penalty, accelerated appeals of death penalty cases, the elimination of federal death penalty resource centers, and the expansion of the right to counsel in some states. All of these policies, along with a period of recession in state and local governments from the late 1980s throughout the early 1990s, exerted new pressures on indigent defense providers to deal with the increase and complexity of cases. These factors also put a severe strain on state and local funding sources to allocate funds adequate to operate programs that fulfilled the constitutional and state right to counsel mandates.

Other developments that heighten the need for the study are the various approaches, many quite innovative, taken to address the increasing demands on indigent defense programs. These include:

- Promulgation of standards and guidelines for the qualifications and performance of counsel by national organizations and by state and local bodies;
- Active pursuit of funds to supplement general fund appropriations, such as application for federal grant funds and creation of new indigent defense revenue enhancers;
- A move toward state oversight for funding and delivery of indigent defense services;
- Litigation in state courts to increase the rate of compensation provided to private court-appointed counsel;
- A substantial growth in county contract systems, in part to cap the yearly expenditures for indigent defense;
- Emphasis on tracking workload in addition to caseload to fine-tune resource requests;
- Development of programs (second public defenders and fixed-fee-per-case contracts) to help contain the costs of the increasingly large number of conflict of interest cases;
- Creation of specialty units in a number of states that focus exclusively on capital cases at trial, appeal and state post-conviction; and
- Creation of state and regional task forces and commissions on indigent defense, initiated by state supreme court, state bar, state legislature, governor, local bar association and independently.

Despite the numerous changes in indigent defense over the last 11 years, there is a notable lack of national trend data documenting these changes. The Spangenberg Group, through contracts with the American Bar Association's Bar Information Program and Post Conviction Death Penalty Representation Project, and through many other contracts, has collected a great deal of indigent defense data since 1986. Unfortunately, the funding has not been available to do so in a systematic, organized fashion. Instead, the research, alternately funded by the Bar Information Program, state and local government, state and local indigent defense providers and others, has been conducted on as "as needed" basis, often without sufficient funding or time to collect as comprehensive data that we know is available.

The comparative information gathered in this landmark study will be critically important to legislators, bar associations, public defenders and others who are seeking to make changes in their indigent defense systems. At a minimum, our 1998 survey will:

- Identify the number and characteristics of indigent defense organizations.
- Measure the way in which states provide legal services for indigent criminal defendants, their caseloads, and policies and practices.
- Determine the types of offenses handled by indigent defense programs, as well as their expenditures, funding sources and related administrative issues.
- Produce a comprehensive portrait of state and local efforts to meet the needs of indigent criminal

defendants and how these systems interact with other components of the criminal justice system.

The RFP for the 1998 National Survey of Indigent Defense Systems requires that the data collection address specialty areas not previously explored in the previous two surveys. The 1998 survey will seek to identify how indigent defense programs provide services related to juvenile issues, death penalty cases, domestic violence cases, family welfare cases and cases processed in drug courts. A preliminary list of other issues to address includes:

- The proliferation of contract programs and ways in which these programs are structured. At the time of the *National Criminal Defense Systems Study*, contract programs were used in only 6% of the counties surveyed. In four years that figure was up to 11%. Without a doubt this figure will be much higher in a contemporary survey.
- The emergence of commissions that provide statewide oversight for the delivery of indigent defense services. In 1986 there were 20 such commissions. Since then, two of the original 20 commissions were eliminated, but ten more were created, bringing the total to 28 today.
- The dramatic growth in conflict cases and varying approaches on how to handle them. This has become a perplexing issue for funders, and since the 1980s jurisdictions with public defender programs have resorted to second public defenders, "Chinese walls," and contracts with private attorneys to replace or complement traditional court-appointed counsel systems.
- State-by-state comparisons of expenditures, caseloads, cost per case, cost per capita, and other "demographic" information.
- Attorney overhead rates. In recent years, a number of states, including Alabama, Louisiana, Mississippi and Oklahoma, have begun using actual attorney overhead costs as a basis to compensate court-appointed counsel handing indigent defendant cases.
- Access to and funding for experts and investigators.
- How to access alternative revenue sources to supplement state or county general fund appropriations.

The Spangenberg Group is enormously pleased to have the opportunity to conduct this critical research. We are looking forward to working with BJS, BJA, and with NORC, a research firm with over 55 years experience conducting complex, nationwide research projects devoted to serving the public interest. We will also work with a 10 to 15-member advisory committee, comprised of representatives from national organizations that stand to benefit from this study, including the American Bar Association, the National Association of Criminal Defense Lawyers and the National Legal Aid and Defenders Association.

We welcome input from the indigent defense community as we shape the survey instrument. Feel free to contact us to discuss any ideas. In addition, we plan to hold a session at the upcoming National Legal Aid and Defender Association conference in St. Louis for those interested to discuss the project with us. We expect many of our readers will be asked to participate in the study as part of the sample selected to complete the detailed survey instrument. ❖

Vera Institute Awarded BJA Grant for Program to Strengthen Defender Management

Seeking to fill a void in the availability of training and support for defender agency managers, the Vera Institute of Justice, a private, non-profit organization that works with government to improve the administration of justice, has been awarded funds from the U.S. Department of Justice's Bureau of Justice Assistance (BJA) to conduct an 18-month long project directed at strengthening the "external" management skills of top indigent defense system managers. Through a multi-faceted program, Vera will offer defender managers intensive and on-going technical assistance similar to that available to other criminal justice managers, such as police executives,

corrections commissioners, district attorneys and court administrators.

Vera notes that, in contrast with many other criminal justice agency managers, defender managers have no professional association, no program of management training and no dedicated source of knowledge and policy development. The two national defender associations, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers, are not structured to provide substantial support to the top managers of defender programs, unlike organizations such as the National Association of Attorneys General or the International Association of Chiefs of Police, which serve prosecutorial and law enforcement managers. Although NLADA provides defender management training, it focuses primarily on internal structure and management issues -- caseload standards, attorney training, personnel management -- and only occasionally on interagency collaboration.

Defender managers are less likely to be involved in interagency planning on systemic issues affecting the criminal justice community than are other criminal justice agency managers. This is in part due to the way in which defender program managers are selected: sometimes outstanding trial lawyers are "rewarded" for superior courtroom work with administrative positions; other times the appointments are political. These methods do not always result in appointees who have significant managerial experience. Vera notes that in most jurisdictions, there is simply no significant supply of or demand for experienced and reputable indigent defense managers, innovators or leaders from which to select new defender managers.

To counter these trends, Vera's project will employ four primary approaches: intensive, week-long executive training seminars for groups of public defender managers; on-site training sessions which will be integrated into existing statewide defender training or annual meetings; bi-monthly, interactive video conference training which follows up on the executive training seminars; and a newsletter for distribution to all seminar and training session participants.

Vera plans to hold three executive training sessions, each accommodating 36 defender program managers from throughout the country. Participants will be drawn from all types of indigent defense services programs -- public defender, assigned counsel and contract -- and will focus on building "external" management skills to equip managers to play a more active role in their jurisdiction's criminal justice system. Examples of topics planned include:

- How to participate as an active member of a local criminal justice coordinating committee;
- Use of data to inform policy development;
- How to effectively participate in community justice initiatives, such as drug courts or community policing;
- Building partnerships with community-based organizations;
- How to staff the external management role;
- Effective participation in the legislative process; and
- How to communicate the importance of the external management role to courtroom defenders.

Vera will make its on-site training component available upon request at various state and local programs such as annual meetings or training sessions. Organizers of state and local programs that would like to offer external management training to defender managers at statewide events will be able to request that Vera staff incorporate modules of manager training in their events. While it will not be able to accommodate an unlimited number of requests, Vera estimates that this approach will enable it to provide management training to as many as 250 individuals over the 18-month project period.

Following the executive training sessions, participants will be invited to participate in an interactive video conference held every other month. In the context of current issues confronting indigent defense providers, the video conferences will reinforce concepts presented in the seminars and

encourage defender managers to push themselves in the definition and practice of their external roles.

Finally, Vera plans to produce at least three newsletters during the 18-month grant period that will cover a range of topics and will be distributed to all seminar and training module participants. The Spangenberg Group hopes to work collaboratively with Vera as our work on the BJS National Indigent Defense Systems Survey (discussed on pages 15-17) progresses. As we identify indigent defense program managers for the survey sample, we will notify Vera to confirm these individuals are offered the opportunity to participate in the training programs.

Death Penalty Information Center Report Probes Risks of Executing Innocent People

A recent publication prepared by the Death Penalty Information Center, a non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment, reports that 69 people have been released from death row since 1973 after evidence of their innocence surfaced. *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent,* released in July 1997, concludes that the execution of innocent people in the United States is inevitable, given the shrinking resources for defense, expansion in the number of death cases, and current emphasis on faster execution.

The document is an update of a 1993 report published by the Center, *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*. That report was prepared at the request of Representative Don Edwards, then Chair of the House Judiciary Sub-Committee on Civil and Constitutional Rights. In the 1993 report, the Center identified 48 individuals who had been released from death row since 1973 after evidence of their innocence emerged. The 1997 report contains biographies of the 21 additional individuals who were released from death row on the basis of evidence proving their innocence since the 1993 report was published. It also profiles:

- Individuals whose cases were reversed and who face a retrial, but in light of significant evidence of their innocence, stand a strong likelihood they will ultimately be completely cleared.
- Individuals released from death row in light of considerable evidence of their innocence, but who were not completely exonerated by virtue of agreement to plead guilty to a lesser charge. After pleading to the lesser charge, most of these individuals were released immediately. Other cases of possible innocence. Profiles of the 48 individuals who were released prior to 1993 appear in the report's Appendix.

The report does not probe the cases of individuals who were executed and who were possibly innocent, however it notes that professors and researchers Hugo Bedau and Michael Radelet have identified 23 instances in which innocent people have been executed in the United States in the 20th century.

The report explores reasons why the risk of executing innocent people is increasing. One reason cited is recent state and federal legislation which shortens the length of time before death row inmates are executed. This is significant, because the inmates who the Center found were later judged innocent spent, on average, seven years on death row before their release. Shortened appellate deadlines will place more death row defendants at peril of execution before a mistaken sentence is discovered.

Another reason contributing to an increased risk of executing innocent people cited by the report is the limitation on resources available to defense attorneys. At the federal level, funding has been eliminated for death penalty resource centers, which helped discover and vindicate a number of innocent death row inmates. At the state level, defense counsel often are limited to strict spending limits in representing indigent capital defendants, and therefore have to determine how best to utilize the limited funds. According to the report, some defense attorneys face the dilemma of spending more time preparing for the sentencing phase in order to save the client's life at the expense of investigating evidence for the guilt phase.

Additionally, the report's authors point out, death penalty defendants are often tried without benefit of eyewitness testimony, in a pressure cooker atmosphere where prosecutors are expected to solve a heinous crime in front of "death qualified" juries. The report suggests that each of these factors may compromise or minimize evidence of innocence, noting, for instance, that the very process of death qualification may send a message to prospective jurors that the issue of guilt is in little doubt.

Since 1973, approximately 6,000 individuals have been sentenced to death in the United States and 69 people have been released with substantial evidence of their innocence. This amounts to roughly one innocent death row inmate for every 100 death sentences. The report wryly notes, "Certainly...a record would be totally unacceptable for a car company whose cars were so defective that they caused fatal crashes in 1 out of 100 vehicles." ❖

Pennsylvania Public Defender Survey Released

In October, the Public Defender Association of Pennsylvania released its 1997 Survey of Pennsylvania Public Defender Offices. The survey was the first comprehensive statewide survey of public defender offices conducted by the Association since 1988, and provides comparable information on staffing, caseload, computer utilization, eligibility for public defender services, and other basic criminal justice system information for 49 of Pennsylvania's 67 counties.

Each county in Pennsylvania is required, by statute, to have a local public defender program. There is no state oversight or state funding of indigent defense services at the trial level. Counties are classified according to population with a number between 1 and 8, with Class 1 being the largest counties. Philadelphia County is the only Class 1 county in the state.

Some of the findings from the survey include the following:

- Full-time public defenders are located in 12 of the 49 counties. In contrast, 23 of the 49 counties have full-time district attorneys and district attorney offices have more full-time assistants than do public defender offices.
- Salaries for full-time public defenders lag behind those of full-time district attorneys.
- Just 22 of the 49 public defender programs responding to the survey have investigators on staff, eight have paralegals and only one (Philadelphia) has social worker staff.
- Most responding counties provided estimates of their 1997 caseloads and few can report a count of cases by category. Few offices use computerized case-tracking programs.
- Only 13 of the responding counties have the capacity for computerized legal research, and most do not have e-mail capabilities.
- In 38 of the responding programs, eligibility for public defender services is determined by the public defender office. In 31 of these 38 offices, the public defenders are also engaged in private criminal practice.
- An objective standard, such as the Federal Poverty Income Guidelines, is used to determine eligibility in 32 of the 49 responding counties.
- Few counties Class 4 or smaller (more than half of the responding programs) have budgeted funds for CLE.

The Public Defender Association hopes to update the report every year or two in order to identify trends that will be helpful in planning. ❖

Kentucky Department of Public Advocacy Issues Press Release Documenting the Effects of Insufficient Funding

As part of its ongoing effort to improve the Kentucky Department of Public Advocacy (DPA), Ernie Lewis, the state Public Advocate, in late October issued a press release which highlights DPA's need for additional funding and staff to reduce caseloads and improve quality of representation. The DPA receives both state and county funds for its trial, post-trial and law operations divisions. Over 100 full-time public defenders staff 18 trial offices in 47

counties, while over 200 attorneys work as part-time trial public defenders in Kentucky's remaining 73 counties. Additionally, the DPA has an independent, federally-funded protection and advocacy division which represents Kentuckians with developmental disabilities.

The press release references the goals set forth in the DPA's plan for 1998 - 2000, which was released in September 1997. Among the most important goals are: increasing the number of full-time public defenders so that 85% of indigent cases are handled by full-time public defenders; enhancing the quality of juvenile representation; hiring new appellate lawyers; and funding the capital post-conviction unit of the post-trial division.

To illustrate the urgency for adequate funding, the press release provides average indigent defense cost per capita and cost per case expenditures in Kentucky ($ 4.59 and $163.00 respectively) in Kentucky, and notes that the average cost per case of a trial-level case in Kentucky ($131) ranks last among states for which comparable data is available. The press release also notes that the DPA receives only 2.79% of the state's criminal justice money, while prosecutors receive over three times more funds than public defenders. Additionally, the press release reveals that for FY 1997, trial and post-trial level cases handled by the DPA "present persistent workload pressures on defenders across Kentucky," observing that "[m]ore and more defenders face demanding, complex and difficult cases involving sex abuse, DUI, and capital allegations."

The press release also details the DPA's request that the state Criminal Justice Response Team endorse adequate funding for the public defender program. The Criminal Justice Response Team was appointed by Kentucky Governor Paul Patton in July 1997 to develop a plan to reform the state's criminal justice system.

We will keep you informed of the DPA's efforts to improve indigent defense services in Kentucky. ❖

TRANSITIONS

New Chief Public Defender Named to New Mexico Public Defender Department

Phyllis Subin has been named the new Chief Public Defender of the New Mexico Public Defender Department, replacing T. Glenn Ellington, who was named to the district court in Santa Fe. Mr. Ellington led the Department through two consecutive, successful legislative sessions, with a net 25% increase to its FY 1997 budget followed by a 5% increase in FY 1998, a year when many other state agencies sustained 2½% cuts to their budgets. He also leaves Ms. Subin with an enhanced MIS system and the beginnings of a monitoring system for the Department's contractor program.

As practitioner, trainer and academician, Ms. Subin has a long history of commitment to the representation of indigent criminal defendants. She worked with the Defender Association of Philadelphia from 1973 to 1995, starting as a trial attorney and progressing to Director of Training, Director of Recruitment, Coordinator of Domestic Violence Policy Issues and Coordinator of AIDS/HIV Policy Issues. After moving to New Mexico in 1995, Ms. Subin served as director of the criminal defense clinic and as a visiting professor at the University of New Mexico School of Law. As Chair of the National Legal Aid and Defender Association's Defender Training Section, Ms. Subin helped produce the organization's Training and Development Standards. ❖

New Public Defender Appointed to New Jersey Office of the Public Defender

Ivelisse Torres was recently confirmed as Public Defender of the New Jersey Office of the Public Defender, becoming the first public defender to be selected from the ranks of the 400-lawyer agency. Ms. Torres served for 10 years as a senior trial attorney. In 1989, Ms. Torres advanced to first assistant deputy public defender, and in 1993 was

appointed head of the Ocean County office. Ms. Torres replaces exiting Public Defender Susan Reisner, who was appointed to a Superior Court judgeship. ❖

Executive Director Selection Process Under Way for Oklahoma Indigent Defense System

The Board of Directors for the Oklahoma Indigent Defense System (OIDS) hopes to select a new executive director by December, 1997. Robert Ganstine, Executive Director since shortly after the agency was formed in 1991, resigned in August 1997. By statute, the executive director must be an attorney who has been licensed to practice law in Oklahoma for at least four years and has experience in the representation of persons accused or convicted of crimes.

With an $11 million state budget appropriation, OIDS is responsible for providing non-capital and capital trial and appellate representation for cases arising in 74 of the state's 77 counties, as well as capital post-conviction representation for all cases in the state. The new executive director will assume leadership of an organization that has been severely underfunded since its inception, and will face numerous challenges to improve the delivery of legal representation to indigent defendants in Oklahoma. ❖

CASE NOTES

U.S. Supreme Court Rules AEPDA Not Retroactive in Non-Capital Federal Habeas Cases

In a five to four decision, a majority of the U.S. Supreme Court ruled in late June that non-capital federal habeas petitions pending on April 24, 1996, the date the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted, are not affected by the changes the AEDPA made to federal habeas corpus law. *Lindh v. Murphy*, 61 CrL 2173.

The AEDPA's modifications to Chapter 153 of Title 28 apply to all habeas proceedings, while the AEDPA's creation of Chapter 154 focuses specifically on capital cases. A provision in Chapter 154 (which focuses on capital cases) specifies that the chapter applies to all cases pending at the time of its enactment; but Chapter 153 (which applies to all habeas proceedings) contains no such provision. Writing for the majority, Justice Souter reversed the U.S. Court of Appeals for the Seventh Circuit, ruling that Chapter 154's change in the standard which federal courts are to use in reviewing claims adjudicated in state courts does not apply to those non-capital cases which were pending at the time the amendments were enacted. The majority's position was based in large part on absence of language in Chapter 153 requiring the amendments to have retroactive effect. This silence, the majority found, is in stark contrast with Chapter 154's explicit inclusion of provisions clearly stating that chapter applies to pending cases. ❖

En Banc Ninth Circuit Reverses Panel Decision in Capital Federal Habeas Case; U.S. Supreme Court Grants Cert.

In early August the U.S. Court of Appeals for the Ninth Circuit, sua sponte, reconsidered a prior decision by a panel of that court, and a majority of the en banc court recalled the mandate issued by the panel which originally denied habeas relief to a capital petitioner. *Thompson v. Calderon*, 61 CrL 1413. The day after the majority's decision, the U.S. Supreme Court granted certiorari to consider the propriety of the en banc court's actions.

Petitioner Thomas Thompson was convicted of raping and murdering Ginger Fleishli. His conviction for rape constituted the aggravating factor used to sentence Thompson to death. On appeal, a federal district court granted partial habeas relief on the ground that trial counsel had provided ineffective assistance by failing to refute evidence of rape and by failing to impeach the testimony of two prosecution witnesses, including one witness who was a jailhouse informer and notoriously unreliable. Later, on appeal to the Ninth Circuit, the panel reversed, holding that

defense counsel's performance did not prejudice Thompson.

The majority wrote that the court's failure to initially consider the case en banc was the result of "procedural misunderstandings by some judges of this court," and that but for these misunderstandings, "an en banc call would have been made and voted upon at the ordinary time." The Ninth Circuit's normal procedure when they believe a panel has erred is to call for a vote on whether to rehear the case en banc, but no such vote was requested when the panel's initial opinion was filed in September 1996. Additionally, the majority wrote that "in reversing the district court, the panel appears to have made fundamental errors of law that, if not corrected, would lead to a miscarriage of justice."

The majority stressed that it did not hold Thompson responsible for the timing of its review, which occurred just days before he was scheduled to be executed. In fact, the majority wrote, Thompson had followed all appropriate procedural steps. Nor did the majority believe that its actions would implicate either the limitations on second or successive petitions contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEPDA) or *McClesky v. Zant,* 499 U.S. 467 (1991), writing, "[w]e are acting not upon the basis of Thompson's petition, but upon the basis of our sua sponte determination to remedy our own errors." In fact, the majority specified that it was acting on petitioner's first habeas petition.

Turning to the merits of Thompson's claims, the majority affirmed the district court's finding that Thompson's defense counsel had been ineffective in regard to the rape conviction, observing that counsel had failed to effectively cross-examine the prosecution's doctor. Additionally, the majority also agreed with the district court that defense counsel was prejudicially ineffective in his failure to impeach two informers who testified against Thompson. The majority also found, contrary to both the district court and the panel, that the prosecutor's fundamentally different theories at Thompson's and his co-defendant's trials constituted a denial of due process.

The four dissenting judges, writing separate opinions, all indicated that the court's sua sponte reconsideration of the panel's decision violates the AEPDA. The U.S. Supreme Court will consider the propriety of the Ninth Circuit's actions in the upcoming 1997-1998 term. ❖

Arizona Supreme Court Rules Prosecutor Must Notify Grand Jury of Target's Offer to Submit Exculpatory Evidence

A majority of the Arizona Supreme Court ruled in mid-August that state statutory law and court rules require a county attorney to inform a grand jury when the target of a grand jury investigation has requested to appear before it or has submitted clearly exculpatory evidence. *Trebus v. Davis*, 61 CrL 1505.

Defendant Trebus knew that he was under investigation for sexually assaulting his stepdaughter. Trebus's lawyer wrote to the deputy county attorney in charge of the Sex Crimes Unit, stating that Trebus had exculpatory evidence he wanted to present to the grand jury pursuant to A.R.S. § 21-412. No one from the county attorney's office responded to the letter, and without notice to Trebus or his attorney, the case was presented to the grand jury, which issued an indictment against Trebus for various crimes against children. Trebus filed a motion to dismiss or, alternatively, to remand to the grand jury for a new determination of probable cause. The county attorney claimed that she never received Trebus' letter, and the trial court denied the motion.

On appeal to the Arizona Supreme Court, the majority considered both Ariz. R. Crim. P. 12.6 and A.R.S. § 21-412, which provides: "The grand jurors are under no duty to hear evidence at the request of the person under investigation, but may do so...The grand jurors shall weigh all the evidence received by them and when they have reasonable ground to believe that other evidence, which is available, will explain the contemplated charge, they may require the evidence to be produced." The majority found that a grand jury target's right to request the grand jury to consider his evidence is implicit in both the statute

and the rule, but also found that neither answers the question of how the grand jury is to be informed of an offer to testify or present exculpatory evidence.

Citing *Johnson v. Superior Court*, 539 P.2d 792, 796 (1975), an analogous case decided by the California Supreme Court, the majority held that due process requirements dictate that the prosecutor, whose interests include both pursuing appropriate indictments and serving the interests of justice, be assigned this task. The majority pointed out that by failing to inform the grand jury of a target's willingness to testify or present exculpatory evidence, a prosecutor may control the outcome of the case, usurping the grand jury's role and depriving the grand jury investigation target of his right to an independent grand jury. The majority reasoned that since Arizona's statutes and court rules give the grand jury, not the prosecutor, the right to decide whether to accept defendant's offer to testify or present evidence, there is nothing wrong with requiring the prosecutor to notify the grand jury of the defendant's offer. The majority also rejected the suggestion that the court rather than the prosecutor should be responsible for informing the grand jury, writing that Arizona's presiding judges have enough to do without incurring additional duties.

Finally, the court considered the nature of the evidence offered by a grand jury target, and concluded that the grand jury should be notified of "clearly exculpatory" evidence, of such weight that it might deter the grand jury from finding the existence of probable cause. In this case, the majority concluded, the evidence Trebus's attorney mentioned in his letter did not meet the "clearly exculpatory" standard, so the county attorney was under no obligation to inform the grand jury of Trebus's offer. ❖

Arizona Supreme Court Requires That Prior Bad Acts Be Proved By Clear and Convincing Evidence

In another decision by the Arizona Supreme Court, a majority of that court ruled in mid-August that before evidence of a defendant's prior bad acts may be admitted in a criminal case, the prior bad acts must be proved by clear and convincing evidence. The majority found that the preponderance standard used by federal courts under *Huddleston v. U.S.*, 485 U.S. 681 (1988), does not adequately guard against unfair prejudice to the defendant. *State (Arizona) v. Terrazas*, 61 CrL 1472.

Under Ariz.R.Ev. 404(b), which mirrors Fed.R.Ev. 404(b), evidence of prior bad acts committed by a defendant is generally inadmissible but may be admitted to establish "motive, intent, absence of mistake or accident, identity and common scheme or plan." Prior to adopting the Federal Rules of Evidence, the Arizona Supreme Court considered the standard of proof to be used in admitting prior bad acts, and ruled that "the test [across the nation] appears to be that the proof both as to the commission of another crime and its commission by the defendant, must be by 'substantial evidence sufficient to take the case to a jury.'" *State (Arizona) v. Hughes*, 426 P.2d 386 (Ariz SupCt 1967).

The majority rejected the state's claim that when Arizona modified its state rules of evidence in 1977, relying substantially on the Federal Rules of Evidence, it also agreed to use the U.S. Supreme Court's interpretation of those rules for Arizona state court cases. Thus, the majority stated, *Hughes* is still good law, and by adopting the federal rules it did not also adopt the preponderance standard set forth in *Huddleston*. The majority also explained why it believed the more onerous "clear and convincing" standard is appropriate: "[s]uch evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge." ❖

Texas Court of Criminal Appeals Rules That Right To Counsel Exists in Quasi-Criminal Contempt Proceedings

A majority of the Texas Court of Criminal Appeals, the state's highest criminal court, ruled in mid-May that a defendant was denied her state and federal constitutional right to counsel by a trial court's failure to advise her of her right to counsel at a contempt hearing which resulted in imprisonment for failure to pay attorney's fees. *Ex parte Gonzales*, 61 CrL 1246. Looking to *Ex parte Cardwell*, 416 S.W.2d 382 (Texas SupCt 1967), the majority agreed that contempt proceedings are quasi-criminal, and should be treated as criminal proceedings to the extent possible. The majority also stated that a person who faces a possibility of imprisonment from any proceeding has a right to the assistance of counsel. ❖

Nevada Supreme Court Invalidates Use of *Anders* Brief for Meritless Direct Appeal

Joining the state of New Hampshire, which in 1994 rejected the use of an *Anders* brief for direct appeals defense counsel believe are without merit, the Supreme Court of Nevada ruled in late August that that state will no longer accept *Anders* briefs; instead, the court directed Nevada attorneys to file a merit brief which pursues defendant's best arguments. *Ramos v. State (Nevada)*, 61 CrL 1534.

Under *Anders v. California*, 386 U.S. 738 (1967), a defense attorney who finds no meritorious issues on which to base a direct appeal is to file a "no merit affidavit" detailing why every potential issue counsel identifies lacks sufficient merit. The Nevada Supreme Court characterized the *Anders* approach as "schizophrenic," and "refuse[d] to accept the notion that an attorney can file a no merit affidavit without actually advocating against the interests of his clients," recognizing "that the *Anders* procedure often entails the expenditure of more court resources than would be expended on a meritorious appeal."

In rejecting the *Anders* approach, the court relied upon *State v. McKenney*, 568 P.2d 1213 (Idaho 1977), in which the Idaho Supreme Court held that counsel need not file a no merit affidavit, and can meet their ethical obligations to the court by filing a brief which makes the defendant's best arguments. The court recognized that its new rule will sometimes mean that counsel must file frivolous appeals, but wrote, "[i]n those rare cases, we create an exception to the rules of professional conduct to allow the pursuit of a frivolous appeal...However, the defense bar is cautioned that it is still obligated to not deceive or mislead the court by, for example, misstating the facts, misapplying the law to the facts, or deliberately omitting facts or authority that are contrary to counsel's position." ❖

Megan's Law Survives Double Jeopardy and Ex Post Fact Challenges, But Public Hearing Process Threatens Due Process Rights, Third Circuit Rules

The U.S. Court of Appeals for the Third Circuit recently considered challenges to New Jersey's "Megan's Law," and a majority of the court ruled in mid-August that the law does not violate either the Double Jeopardy or Ex Post Facto Clauses when applied to sex offender registrants whose crimes were committed before enactment of the law. However, the majority found that the hearing requirement which the New Jersey Supreme Court imposed does not sufficiently protect registrants' federal due process rights. *E.B. v. Verniero*, 61 CrL 1461.

Megan's Law, which creates New Jersey's sex offender registry, requires prosecutors to classify all persons who complete a sentence for certain designated crimes involving sexual assault after the law took effect. The law established three classifications: Tier 1 (requiring law enforcement alert); Tier 2 (requiring law enforcement, school and community alert) and Tier 3 (requiring community notification). To evaluate the degree of risk and classify offenders, New Jersey prosecutors are required to use the Registrant Risk Assessment Scale, which was designed with the assistance of mental health and law enforcement professionals. The information released for offenders classified as Tier 2

or Tier 3 includes the offender's name, description, recent photograph, address, place of employment or schooling, and a description of any vehicle used by him or her along with its license number.

Previously, in *Artway v. Attorney General*, 81 F.3d 1235 (CA 3 1996), the court considered and rejected claims to the law's Tier 1 classification and notification requirements. Here, plaintiffs challenged the constitutionality of Tiers 2 and 3.

The majority found that the statute, as it pertains to Tiers 2 and 3 classifications, meets the *Artway* test regarding the Double Jeopardy and Due Process Clauses. Under the *Artway* three-prong analysis, the court considered: 1) the actual purpose of the statute; 2) the objective purpose of the statute; and 3) whether the statute's effect constitutes non-punishment. The majority concluded that each of the *Artway* prongs is satisfied in relation to Tiers 2 and 3. Both the legislature's stated purpose for enacting Megan's Law and the legislative history support the proposition that it was enacted for remedial purposes, and not for punitive purposes. The majority also found that analogous registration requirements did not serve a punitive purpose, so long as they serve a legitimate government purpose. Finally, looking to *Artway*, the majority determined that the effect of the registry requirement is not so harsh "as a matter of degree" as to constitute punishment.

Turning to plaintiffs' procedural due process claim, the majority first determined that the state must make available a pre-notification judicial review process for registrants who wish to challenge their classification or the notification plan. The majority agreed with plaintiffs that due process requires that the burden of persuasion at a Megan's Law hearing be on the state rather than the registrant, and that the state must prove by clear and convincing evidence both the classification and the notification plan it has assigned to a registrant. Relying on the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976), the court considered the following three factors to hold that the state must prove its case by clear and convincing evidence in a Megan's Law proceeding: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Citing *Addington v. Texas*, 441 U.S. 418, 427 (1979), the majority concluded that because "the possible injury to the individual [registrant] is significantly greater than any possible harm to the state," the registrant, consistent with due process, cannot "be asked to share equally with society the risk of error." ❖

Washington Supreme Court Upholds Statute Allowing Transfer of Juveniles to Adult Prison

In late June, in a five to four decision, a majority of the Washington Supreme Court rejected a challenge to the state's juvenile transfer law, upholding RCW 13.40.280, the statute which permits transfer from a juvenile facility to an adult prison upon an administrative board's determination that the juvenile presents a "continuing and serious threat to the safety of others at the institution." However, the majority also held that these juveniles must be segregated from adult prisoners. *Monroe v. Soliz*, 61 CrL 1336.

Antonial Monroe was committed to a juvenile detention facility, and while there, he assaulted staff and other residents, and displayed other serious misbehavior. After an administrative hearing conducted in accordance with the transfer statute, Monroe was moved to an adult prison. On appeal, Monroe claimed that RCW 13.40.280 violates his right to trial by jury because it allows the state to punish a juvenile in the same manner as a convicted adult criminal, without giving the juvenile the benefit of a jury trial.

Rejecting Monroe's claim, the majority found that while the statute allows the venue of custody to be changed, the incarceration remains juvenile in nature. According to the majority, the policy underlying

Washington's 1977 Juvenile Justice Act is that juvenile detention is rehabilitative in nature, while the adult incarceration system is punitive in nature. Additionally, the majority pointed out, the statute in question provides that a juvenile may be returned to the juvenile facility at any time, so long as the staffs of prison and juvenile detention facilities agree. The majority also observed that a transferred juvenile who is released and later commits another offense is not subject to adult prosecution, but instead is retried under Washington's juvenile law. Finally, the majority pointed out, RCW 13.40.280 must be read in conjunction with RCW 13.04.116(1)(a), which requires juveniles who are housed in a jail or other adult facility to be confined "separate from the site and sound of adult inmates..."

In dissent, four justices agreed with Monroe that the statute in question violates the right to a jury trial. ❖

Second Circuit Holds that Written Order Explaining Reasons for Sentencing Cannot Substitute for Providing the Explanation "In Open Court"

A federal district court cannot meet the requirements of 18 USC 3553(c)(1) by issuing a written, post-sentencing judgment explaining the reasons for imposing a sentence because the statute specifically requires that the explanation be made "in open court" at the sentencing proceeding, the U.S. Court of Appeals for the Second Circuit recently held, vacating defendant Reyes's sentence and remanding the case for resentencing. *U.S. v. Reyes*, 61 CrL 1299.

The statute requires that "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of a particular sentence." Looking to the statute's legislative history, the court wrote that the statute's requirement that the court provide an explanation in open court is intended to: 1) give the defendant an opportunity to challenge any perceived error in the judge's reasoning prior to the formal entry of judgment; 2) assist appellate review of the sentence's reasonableness; 3) educate the public and serve a deterrent function; and 4) provide valuable information to criminal justice researchers and the Sentencing Commission regarding the effectiveness of the guidelines in achieving their stated aims.

While the sentencing judge's written explanation for the sentence contained a lucid explanation for the reasons the judge chose to sentence Reyes for a term slightly shorter than the midpoint of the federal sentencing guidelines, the judge's failure to do so in open court was in clear violation of the mandate of 18 USC 3553(c)(1), the court ruled, and thus, the case must be reversed and remanded. ❖

En Banc Fourth Circuit Reverses Panel Opinion Granting Habeas Relief to Indigent Petitioner Denied Free Trial Transcript on Direct Appeal

In late May, a majority of the en banc U.S. Court of Appeals for the Fourth Circuit reversed a panel decision, chronicled in Volume III, Issue 2 of *The Spangenberg Report*, which granted relief to a habeas petitioner who had been denied a free trial transcript on direct appeal because, though indigent, petitioner was represented by pro bono counsel rather than by the public defender. *Miller v. Smith*, 61 CrL 1233.

Following his conviction for felony murder in state court, Miller tried to obtain his trial transcript to perfect his direct appeal. As an indigent appellant, Miller sought the transcript at state expense. However, because he was represented by pro bono counsel rather than by the state public defender, a state judge denied his request, ruling that Maryland Rule 1-325(b) requires that an indigent be represented by the state public defender's office in order to receive trial transcripts at state expense. The court ruled that Miller failed to meet the rule's requirements because he refused to accept public defender representation and because his counsel refused to seek designation as assigned counsel so that he could represent Miller under the supervision of the public defender's office.

While the Fourth Circuit panel, reversing the Maryland Court of Appeals, found that Miller had been denied both his Sixth Amendment right to counsel and his Fourteenth Amendment rights to

equal protection and due process, a majority of the en banc Fourth Circuit disagreed, writing that "... the State of Maryland has created a system in which indigent defendants can fairly present their claims to the appellate court." Citing *Ross v. Moffitt*, 417 U.S. 600 (1974), the majority found that "the State of Maryland may not have duplicated the arsenal of a wealthy defendant. Nevertheless, the State of Maryland has created a system in which indigent defendants can fairly present their claims to the appellate court. That is all the Fourteenth Amendment requires." The majority also expressly rejected Miller's claim that the trial court's denial of his motion for a trial transcript pursuant to Md. Rule 1-325(b) violated his right to counsel of choice, citing *Wheat v. U.S.*, 486 U.S. 153, 159 (1988), for the proposition that an indigent defendant, while absolutely entitled to counsel, has no constitutional right to representation by a particular lawyer.

Dissenting, three judges who had comprised the panel's majority reiterated their belief that Maryland's rules violate due process and equal protection because the state's justifications do not outweigh the individual interest at stake. ❖

Fifth Circuit Reverses, Holding Indigent Defendant Has Right to Effective Assistance of Counsel on State-Initiated Discretionary Review

On rehearing, in mid-July, the U.S. Court of Appeals for the Fifth Circuit reversed its previous opinion, holding that when the state initiates discretionary review proceedings, an indigent defendant has a Sixth Amendment right to effective assistance of counsel. *Blankenship v. Johnson*, 61 CrL 1393. As we reported in Volume III, Issue 4 of *The Spangenberg Report*, in 1988, Blankenship was convicted of aggravated robbery, sentenced to ten years in prison and released pending the outcome of his direct appeal, which was handled by Michael Lantrip, his court-appointed attorney. On direct appeal, Lantrip successfully argued that the indictment filed against Blankenship was fatally deficient, and the appellate court reversed his conviction. Soon after oral argument on the direct appeal was completed, Lantrip was elected county attorney, but he failed to withdraw from defendant's case or notify defendant of his new position. When the state pursued discretionary review of the appellate court's reversal to the Texas Court of Criminal Appeals, the state's petition was served on Lantrip, who was still Blankenship's attorney of record. Lantrip neither responded to the petition nor notified Blankenship of these developments, and the Court of Criminal Appeals reversed the appellate court. Blankenship did not learn of the state's appeal until the police arrested him in April 1990.

After exhausting his state court remedies, Blankenship filed for federal habeas relief, which the district court denied. While a Fifth Circuit panel initially ruled against Blankenship, on rehearing, the court reversed, indicating that its previous decision was overruled by the U.S. Supreme Court's recent ruling in *Lindh v. Murphy*, 61 CrL 2173 (1997), in which the Supreme Court held that the AEDPA does not apply to habeas petitions filed in non-capital cases prior to the AEDPA's enactment. The court also acknowledged that while *Teague v. Lane*, 489 U.S. 288 (1989) prohibits the application of a new rule of law in the context of a habeas petition, the state failed to raise this defense.

The court recognized the "well-settled rule that a criminal defendant does not have a right to counsel for the preparation of petitions for discretionary review," citing *Ross v. Moffitt*, 417 U.S. 600 (1974). However, the court refused to extend the rule and hold that there is no right to counsel during the discretionary review itself. Returning to the U.S. Supreme Court's decision in *Douglas v. California*, 372 U.S. 353 (1963), in which the Supreme Court held that indigent criminal defendants have the right to appointed counsel in direct appeals, the court found that this right would be impaired "if the state were allowed to challenge the defendant's successful direct appeal without providing him with counsel after a discretionary appeal is granted to the state." Not only would the unrepresented defendant be unable to defend the reversal of his conviction, but additionally, the court

expressed concern that if the state felt it was likely that discretionary review would be granted on its petition, it might "sandbag the first appeal."

After holding that Blankenship had the right to counsel during the state-requested discretionary appeal, the court next considered whether he suffered from ineffective assistance of counsel during the appeal. Under *Strickland v. Washington*, 466 U.S. 668 (1984), because attorney Lantrip had constructively denied Blankenship counsel during the appeal, the court presumed he had been prejudiced and thus, effective assistance was denied. Moreover, the court found, Lantrip's performance was ineffective under *Culyer v. Sullivan*, 446 U.S. 335 (1980), because he both actively represented conflicting interests and has an actual conflict of interest that adversely affected his performance. ❖

Illinois Court Finds "Guilty But Mentally Ill" Statute Unconstitutional

A majority of the Illinois Appellate Court, Second District, recently struck down Illinois' "guilty but mentally ill" statute, finding that the statute unconstitutionally infringes upon a defendant's due process rights and remanding the case for a new trial. *People (Illinois) v. Robles*, 61 CrL 1395. The statute at issue, 720 ISCS 5/6-2, provides in part, "(c) A person who, at the time of the commission of a criminal offense, was not insane but was suffering from mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill." The statute also defines "mentally ill" as a "substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate to wrongfulness of his behavior or is unable to conform his conduct to the requirements of law."

Defendant Robles, charged with first-degree murder and solicitation of murder, raised the insanity defense. At the state's request, the jury was instructed on the verdict of "guilty but mentally ill" along with the verdicts of guilty, not guilty, and not guilty by reason of insanity. After sending the court two notes requesting clarification of the jury instructions, the jury found Robles guilty but mentally ill on all counts.

On appeal, Robles argued that the statute violates his right to due process by misleading jurors into believing they can assign a lower level of culpability and a lower level of punishment to a mentally ill defendant. The statute, Robles argued, encourages compromise verdicts.

The Appellate Court, citing *People v. Crews*, 522 N.E.2d 1167 (Ill SupCt 1988), stated that a guilty but mentally ill verdict does not reflect a diminished culpability or criminal capacity. Indeed, the court concluded, such a verdict is identical to a "guilty" verdict in terms of potential punishment and/or psychiatric treatment. Additionally, the court pointed out, as of 1989, the treatment available to prisoners found to be guilty but mentally ill was identical to that of other prisoners. Thus, the court concluded, the guilty but mentally ill statute has no practical effect.

While the guilty but mentally ill statute may have no practical effect in terms of punishment or treatment options, the court determined that jurors who are "confronted with this continuum of verdicts assume that the GBMI verdict represents a distinct and separate position on this continuum. In all probability, they further assume that the GBMI verdict indicates that some sort of ameliorative disposition will be afforded the defendant. We find these misconceptions and misunderstandings encourage a compromise verdict of GBMI, which is devoid of any substance." Citing *People v. Reddick*, 526 N.E.2d 141 (Ill SupCt 1988), an analogous case regarding jury misleading instructions, the court also found that in order to obtain a guilty but mentally ill conviction, the defendant "had to prove the existence of a culpable state of mind which he had maintained throughout the trial did not exist." ❖

Texas Court of Criminal Appeals Prohibits Peremptories Because Veniremembers Are Same Sex and Race as Defendant

In mid-June a majority of the Texas Court of Criminal Appeals, the state's highest criminal court, ruled that the state violated the Fourteenth Amendment's ban on gender discrimination by it use of peremptory challenges because the sex and age of the veniremembers were the same as the defendant's. *Fritz v. State (Texas)*, 61 CrL 1306. During jury selection in defendant Fritz's capital murder trial the state peremptorily challenged seven male veniremembers, and the prosecutor indicated that he removed all males under the age of 30 because of their potential bias and shared identity with the defendant. On appeal, Fritz claimed that the prosecutor violated the Fourteenth Amendment as interpreted by the U.S. Supreme Court in *J.E.B. v. Alabama ev rel. T.B.*, 511 U.S. 127 (1994).

While under *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure," in *J.E.B.*, the court held that gender discrimination in the jury selection process also violates the defendant's Fourteenth Amendment right to equal protection. Relying on this precedent, a majority of the Court of Criminal Appeals ruled that Fritz's equal protection rights had been violated. The majority focused on the Supreme Court's concern for the negative and inaccurate stereotyping which accompanies a peremptory challenge based upon race or sex. The majority also cited *Williams v. State*, 804 S.W.2d 95 (Tx. 1991) and *Hill v. State*, 827 S.W.2d 860 (Tx. 1992), its own previous decisions in which it had forbidden stereotyping. In conclusion, the majority stated, "[w]henever a veniremember is excluded on the basis of gender, the Equal Protection Clause is violated. We, therefore, hold the State's peremptory challenges violated the requirements of *J.E.B.*" ❖

Substitution of Jury Member During Sentencing Deliberations Improper, North Carolina Supreme Court Rules

In early June, in a case of first impression, the North Carolina Supreme Court found reversible error had occurred where a trial court excused a juror after half a day of sentencing deliberations in a capital case and substituted an alternate juror, instructing the jury to start deliberations again. *State (North Carolina) v. Bunning*, 61 CrL 1294. The court ruled that in such situations a new sentencing proceeding must be held. The court's decision turned on Article I, Section 24 of the North Carolina Constitution, which "contemplates no more or less than a jury of twelve persons." In this case, the court found, assuming the excused juror made some contribution to the verdict, the jury verdict was reached by more than twelve persons. Additionally, the court pointed out, because the substitute juror was not privy to jury discussions which occurred prior to his being named a juror, it was impossible to determine whether the substitute juror fully participated in reaching a verdict. The court concluded that "eleven jurors fully participated in reaching a verdict, and two jurors participated partially in reaching a verdict. This is not the twelve jurors required to reach a valid verdict in a criminal case."

The court also observed that while state statutory law does not directly address the issue, several statutory provisions support the conclusion that substitution of jurors is prohibited once sentencing deliberations have begun. Finally, the court concluded that trial by an improperly constituted jury cannot be harmless error. ❖

Florida Supreme Court Grants Stay for Capital Post-Conviction Evidentiary Hearing Because of Lack of Funds

In late May, a majority of the Florida Supreme Court granted a stay on a death row inmate's post-conviction evidentiary hearing because petitioner's counsel, the state-funded Capital Collateral

Representative (CCR), lacked sufficient funds to proceed. *Hoffman v. Haddock*, 61 CrL 1291. While CCR claimed it has long been under-funded by the state, the state claimed that CCR mismanaged its monies. The majority steered clear of both arguments, pointing out that CCR was in the midst of an audit and that it was attempting to secure additional funds. Because CCR is a state-funded entity, the majority pointed out, Florida's counties could to be called upon to supplement its funds. CCR's appropriation for FY 1998 was scheduled to go into effect on July 1, so the majority granted a continuance until July 15. ❖

Ninth Circuit Strikes Down As Unconstitutional San Diego's Juvenile Curfew Ordinance

Reversing a lower court, the U.S. Court of Appeals for the Ninth Circuit struck down as unconstitutional San Diego's curfew ordinance which makes it illegal for minors to "loiter, idle, wander, stroll or play in or upon ... public places ... or other supervised places" after 10:00 p.m. The ordinance contains exemptions for minors accompanied by an adult, running an emergency errand for an adult, returning home from an event sponsored by local education authorities, or traveling from work. *Nunez v. San Diego, Calif.*, 61 CrL 1287.

Citing *Kolender v. Lawson*, 461 U.S. 352 (1983), the court stated that to avoid unconstitutional vagueness, an ordinance must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is permitted and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. The court also stated that the need for definiteness is greater when, as here, the ordinance imposes criminal penalties on individual behavior or implicates constitutionally protected rights than when it regulates business activity. The court found fault with both the ordinance's language ("loiter, idle, wander, stroll or play in or upon") and the district court's interpretation of the prohibited activities: "hanging out," labelling both as insufficiently precise. As a result, the ordinance fails to provide police with clear enforcement standards and leaves much to their discretion.

The city offered its concern for reducing juvenile crime and juvenile victimization as its compelling reason for imposing the ordinance. While the court agreed that the purpose of the ordinance may be compelling, it found that the ordinance is not sufficiently narrow to meet constitutional requirements because it does not provide exceptions for many legitimate activities juveniles may engage in, with or without parental permission.

Finally, the court addressed whether the ordinance's restrictions on legitimate exercise of minors' First Amendment rights make the ordinance unconstitutionally overbroad. While the court observed that the focus of the ordinance is on conduct, not speech, it also concluded that the ordinance restricts minors' ability to engage in many First Amendment activities during curfew hours. Again the court determined that while the ordinance may have a sufficiently compelling purpose (minors' well-being), it is not sufficiently narrow to exempt from the curfew legitimate First Amendment activities. ❖

JOB OPENINGS

We are pleased to print job openings submitted to *The Spangenberg Report*.

Training Director, Indiana Public Defender Council

The Indiana Public Defender Council, located in Indianapolis, is now accepting applications for a training director whose will be responsibilities include planning and supervising training programs for attorneys representing indigent defendants. Applicants must have: 1) experience in the criminal justice system, preferably representing indigent defendants; 2) experience in designing and conducting training; 3) outstanding verbal and written communication skills; and 4) the ability to work successfully as a member of multiple teams. Salary is $40,000 - $50,000, depending on experience and background. Send cover letter, writing sample and three professional references to: IPDC Training Director Search, 309 W. Washington Street, Suite 401, Indianapolis, IN 46204. The Indiana Public Defender Council is a Sate agency which provides support services, including research assistance, training and publications, to public defenders throughout Indiana. ❖

NEW PUBLICATIONS

Updated Survey of Compensation Rates Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial Now Available

The Spangenberg Group recently completed its update of a national survey of rates of compensation paid to court-appointed counsel in non-capital felony cases at the trial level. The survey was prepared on behalf of the ABA's Bar Information Program, and was last updated in 1994. For the first time, the survey information is presented in table format accompanied by a narrative piece describing the different approaches to compensating non-public defender counsel throughout the states. The narrative and table describe the systems in place in each of the 50 states, plus the District of Columbia.

In order to receive a copy of "Rates of Compensation to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview" (October 1997), please call us at (617) 969-3820. ❖

We welcome your comments on this issue and would be pleased to entertain your suggestions for future articles. *The Spangenberg Report* is written and produced by members of The Spangenberg Group:

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